IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2319 OF 2004

Bagal Dada @ Baburao Bhagwan ... Applicant

versus

State of Maharashtra and anr. ... Respondents

...

Mr. Uday Warunjikar, for the Applicant.

...

CORAM : A.M.KHANWILKAR,J.

1st December 2004

P.C.:

. Heard Counsel for the Applicant. I see no reason to depart from the view taken by the Sessions Court in allowing the revision application and requiring the trial Court to consider application, Exhibit 28, on the basis of evidence, which is available against the proposed accused. To get over this position, learned Counsel contends that the powers under section 319 of the Code could be invoked only after recording of oral evidence had commenced. To buttress this submission, reliance is placed on

the decisions - of the Calcutta High Court reported in 1987 Cri.L.J. 729 in Gulam Mondal v. Nazam Hossain and others; of our High Court reported in 2001(3) Mh.L.J. 473 in Rukhaminabai Vithalrao Jogdand v. State of Maharashtra; of the Apex Court reported in A.I.R. 1998 S.C. 3148 in Ranjit Singh v. State of Punjab. The decisions pressed into service are of no avail. The Court below has rightly adverted to the recent decision of the Apex Court reported in 2001 Cri.L.J. 3511 in Rakesh v. State of Haryana to hold that it is not necessary that witnesses must be examined before invoking powers under section 319 of the Code. That view is fortified from the exposition in para 13 of the recent decision of the Apex Court in Rakesh (supra). While adverting to the expansive definition of expression "evidence", the Apex Court has observed that word "evidence" occurring in subsection is used in comprehensive and broad sense, which would also include the material collected by the investigating officer and the material or evidence which comes before the Court and from which the Court can prima facie conclude that person not arraigned before it is involved in the commission of crime. In the present case,

therefore, the Court below has observed that the opinion expressed by the trial Court that exercise of powers under section 319 of the Code was premature at this stage was inappropriate. This conclusion reached by the Sessions Court in the impugned judgment, to my mind, is the correct application of the legal position stated by the Apex Court in Rakesh (supra). Indeed, the opinion expressed by the Sessions Court would appear to be contrary to the law stated by the Calcutta High Court as well as our High Court in Gulam (supra) and Rukhaminabai (supra) respectively. However, in the light of the recent decision of the Apex Court in Rakesh (supra), the opinion recorded in the decisions of the High Courts, referred to above, that evidence means examination-in-chief and cross examination and cannot be the other documetns, which form materials on record, will have to be assumed as impliedly overruled.

. Much stress was placed on the decision of the Apex Court in Ranjit Singh (supra). However, even that decision is of no avail to the Applicant herein. In that case, amongst others, the discussion proceeds with reference to the

question as to whether the committal Court would invoke powers under section 319 of the Code. That is not the question on hand. In the present case, we are concerned with private complaint and it is not in dispute that the Court has already taken cognisance by issuing process. If it is so, the basis of materials on record which will include documents already on record, it will be open to the trial Court to invoke powers under section 319 of the Code, if such a case is made out. This is the limited declaration rendered by the Court below, which, to my mind, is the correct approach.

. Reliance was also placed on the decision of our High Court reported in 1999(3) Mh.L.J. 23 in Natwarlal D. Rathod and others v. State of Maharashtra and another to contend that mere notice issued by the credit society cannot be the basis to invoke powers under section 319 of the Code. This argument need not be gone into at this stage, because, by the impugned order, the Court below has referred the matter back to the trial Court for examining the issue on merits. This question, therefore, will have relevance only after the opinion is recorded by the trial

Court one way or the other to exercise powers under section 319 of the Code. Hence, this petition is devoid of merits. Dismissed.